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No. 87-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,
Petitioners,

v.

JEROME D. SALINGER a/k/a J. D. SALINGER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for petitioners has been obtained, but counsel for respondent has refused consent.

The AAP is a trade association of book publishers in the United States. Its approximately 250 members publish books accounting for 70-75% of the dollar volume of all books published in this country. These include a great many historical works, biographies of public figures, and other works that, following the great traditions of scholarship, must rely upon reasonable quotation and paraphrase of letters and other "unpublished" documents deposited in libraries and archives (or with other third parties).

Additionally, all AAP members have a direct interest *both* in the protection of their works by copyright and the creation and dissemination of scholarly and popular works that make

fair use of others' copyrighted works. A properly balanced fair use doctrine is essential to the entire publishing community.

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the AAP submitted a brief *amicus curiae* that sought reversal of the Court of Appeals' over-expansive application of fair use to unpublished *and undisseminated* works. The AAP position was reflected in this Court's opinion reversing the decision below.

In this case, the Court of Appeals purported to follow the principles established in *Harper & Row* and advocated by the AAP. The attached brief will show, however, that the Court of Appeals misconstrued these principles. It thereby inhibited the creation of all works of history, biography, and the like that rely on letters and similar primary research materials, and endangered the delicate relationship between copyright law and the First Amendment provided by a balanced fair use doctrine.

The AAP seeks to demonstrate that the Court should grant certiorari in order to restore the proper fair use balance and to remove the chill to scholarship and publishing caused by the Court of Appeals' decision. The AAP also specifically seeks to demonstrate that particular sections of the Copyright Act, allocating prerogatives among writers of letters, owners of copies of those letters, and the public compel reversal of the Court of Appeals' decision.

Many AAP members publish fewer books per year than petitioner. They can ill afford the litigation, let alone the injunction, that would follow if they sought to publish scholarly works that used technically unpublished, but accessible, research sources. Copyright policy has traditionally permitted fair use of such materials. The effect of the Court of Appeals' decision to the contrary has spread substantial uncertainty throughout the publishing community.

To present its views as to why this Court should grant certiorari in this important copyright case, the AAP moves for leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITION FOR CERTIORARI

THE INTEREST OF *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") respectfully submits this brief *amicus curiae* in support of the petition of Random House, Inc., and Ian Hamilton for a writ of certiorari.

The AAP is a trade association of book publishers in the United States. Its approximately 250 member companies and subsidiaries publish between 70% and 75% of the dollar volume of all books published in the United States. These publications include historical works and biographies and autobiographies of public figures, virtually all of which are based at least in part on letters and other documents that are both protected by copyright and available for fair use by scholars.

Publishers have a direct and compelling interest in both the protection against appropriation of literary property guaranteed by § 106 of the Copyright Act and the privileges fostering the harvest of knowledge and the publication of scholarly historical and biographical work guaranteed by § 107—the Copyright Act's fair use provision. The Second Circuit's decision has disturbing implications for the creation and publication of biographies and scholarly works of history.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fair use doctrine, now codified in 17 U.S.C. § 107, expressly shelters publishers and scholars whose works draw on primary source materials. The statute provides that a prime purpose of fair use is to advance "criticism, comment . . . scholarship [and] research," and legislative history specifically endorses the "quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations" as a core example of fair use. H.R. Rep. No. 1476, 94th Cong., 2d Sess., 65 (1976); S. Rep. No. 473, 94th Cong., 1st Sess., 61 (1975). The Court of Appeals threatened this legislative purpose when it gave too little weight to this vital consideration, and decisive weight to the technically unpublished nature of the disseminated letters.

Despite acknowledging that under *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), fair use is applicable under "special circumstances" to "unpublished works," *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987), the Court of Appeals held that unpublished works "normally enjoy complete protection against copying. . . ." 811 F.2d at 97. But Mr. Salinger's letters are unpublished in the technical sense only. They have been disseminated to university libraries, where they have been available to interested readers. Acting under the express policies and provisions of the Copyright Act, the recipients lawfully lodged the letters at university libraries; the libraries made the letters accessible to scholars; and a scholar—Ian Hamilton—made reasonable use

of the letters consistent with scholarly tradition and copyright policy. The *availability of the letters for scholarly research* is precisely the "special circumstance" that renders incorrect the holding below that the letters are completely insulated against fair use under *Harper & Row*. The Copyright Act does not grant Mr. Salinger a right to impose his reclusiveness on the owners of his letters, on those to whom his letters have been disclosed, or on the public.

The scholarly use of unpublished but disseminated letters of literary figures like Mr. Salinger, or of men and women of comparable historical or political interest, reaches far beyond the mere chronicling of dry facts and events to which the Court of Appeals' decision has confined it. Such scholarly work has in the past extended, and must continue to extend, to the discernment, consideration and effective presentation of the qualities of mind, thought, style and expression that make great artists and political figures worthy of serious study in the first place. *See generally* L. Edel, *Literary Biography* (1957). The Court of Appeals' contrary judgment, enforced through the unjustified remedy of a prior restraint, should be reviewed and reversed by this Court.

REASONS FOR GRANTING THE WRIT

A properly balanced application of the fair use doctrine is of vital importance to publishers.

In *Harper & Row* the AAP, as *amicus curiae*, opposed the defendant's *overly-expansive* fair use claim, emphasizing that President Ford's memoirs were neither published in the technical sense nor disseminated, disclosed, or available in any practical way. The Association stressed that President Ford's memoirs were being groomed for imminent publication, and that Harper & Row's copyright claim was not being pressed to suppress the disclosure of public information. The AAP urged that the Second Circuit's decision misconceived the relationship between copyright and the First Amendment and sanctioned serious interference with the publishing process.

Here, the Second Circuit's acceptance of Mr. Salinger's *overly restrictive* reading of fair use with respect to his disseminated (and only technically unpublished) letters poses analogous dangers. An important function of the fair use provision in the Copyright Act is to serve as a safety valve to accommodate the First Amendment and copyright. By virtually eliminating fair use for disseminated materials that have been lodged in university and other libraries, and are only technically unpublished, the Second Circuit has severely constricted the fair use doctrine's ability to serve that function. The judgment below threatens the interests not only of AAP members, but of all who write and read biographies, histories, autobiographies, and similar non-fiction works and of the public. It warrants this Court's attention.

I.

THE COURT OF APPEALS' UNDUE EMPHASIS ON THE TECHNICALLY UNPUBLISHED NATURE OF THE ACCESSIBLE LETTERS MISCONSTRUES THIS COURT'S DECISION IN HARPER & ROW, THE POLICIES OF THE COPYRIGHT ACT, AND FAIR USE DOCTRINE

The letters Mr. Hamilton used in writing his biography of Mr. Salinger were lawfully lodged with research libraries at Harvard, Princeton, and the University of Texas, and were lawfully available there for use by scholars.[1] *See* 17 U.S.C. § 202 (distinguishing between owner of copyright—here, Mr. Salinger—and owner of the material object—here, the recipients of his letters or libraries); 17 U.S.C. § 109(a) (owner of letters entitled "without the authority of the copyright owner" to dispose of possession); 17 U.S.C. § 109(c) (owner of letters entitled "without the authority of the copyright owner" to display them publicly).

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[1] "Most, if not all" of the letters used by Mr. Hamilton are in the three university libraries. *Salinger v. Random House, Inc.*, *supra*, 811 F.2d at 93. The panel did not distinguish between those letters that are held by private individuals and those more widely available in the libraries. In any event, the governing principle remains the same: the recipients of the letters were entitled to disclose and display them.

The Court of Appeals misconstrued *Harper & Row* when it ignored these facts, and applied a sterile fair use doctrine that it erroneously believed was applicable to all works that are technically unpublished.

This Court held in *Harper & Row* that "[*u*]*nder ordinary circumstances,* the author's right to control the first public appearance of his *undisseminated* expression will outweigh a claim of fair use." 471 U.S. at 555 (emphases added). But the Court also stressed that:

> [t]his absolute . . . rule . . . [has always been] tempered in practice by the equitable nature of the fair use doctrine. In a given case, factors such as implied consent through de facto publication or performance or dissemination of a work may tip the balance of equities in favor of prepublication use.

471 U.S. at 551 (citing authorities).

Both the Court's analysis and the authorities on which it relied were consistent with the AAP brief, which stressed both the Association's own position and the legislative intent from the earliest discussions of copyright revision that "fair use *should* apply to disseminated or disclosed, but technically unpublished works." AAP Brief *Amicus Curiae, Harper & Row v. Nation Enterprises,* at 10 n.7 (emphasis supplied); *see also id.* at 9 n.6 (exemption from narrow application of fair use for "disclosed but unpublished works"). Variations upon this theme of "disseminated but unpublished" works were a principal consideration behind this Court's and the legislative reports' cautionary use of "ordinary circumstances." *See Harper & Row, supra,* 471 U.S. at 551.

The accessibility of letters such as Mr. Salinger's for scholarly use at research libraries renders them precisely the "disseminated but unpublished" works to which the "narrower scope" of fair use for unpublished works described in *Harper & Row* does not apply.

That Mr. Salinger is reclusive and that he might not have intended letters he wrote to be disclosed and accessible in research libraries does not affect the application of fair use to these disseminated materials.[2] Sections 202 and 109 of the 1976 Act, in tandem, refute any claim that the Copyright Act grants the authors of letters the right to impose their reclusiveness on letter owners, on those to whom the letters have been disclosed, on scholars or on the public. The affirmative policies of the Act these provisions embody—balancing among the rights of the copyright owner, the rights of the owner of the material object in which the copyrighted material is embodied, and the public—deny precisely that right. Mr. Salinger would deny access to those who cannot individually *visit* the libraries. This only emphasizes that authors must be permitted to make "fair use" of pertinent quotations from these publicly available research materials for the benefit of the interested public and in furtherance of the policies of both the Copyright Act and the First Amendment. Review of the decision below is necessary to correct the Court of Appeals' misapplication of applicable law and this Court's decision in *Harper & Row*.

II

THE COURT OF APPEALS' UNDUE EMPHASIS ON THE TECHNICALLY UNPUBLISHED NATURE OF THE LETTERS JEOPARDIZES THE PREPARATION AND PUBLICATION OF SCHOLARLY WORKS OF HISTORY AND BIOGRAPHY

The creation and publication of scholarly works on contemporary historical subjects depends in large measure on the collections of letters and papers in our nation's great research libraries. The Court of Appeals' mis-reliance on the holding of *Harper & Row*, exacerbated by its unprecedented prior restraint, will irreparably interfere with that work.

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[2] Some of the letters were even more widely accessible. A bibliography of source material on Mr. Salinger published by Garland Press listed and quoted from letters in Princeton's collection.

Letters have served a time-honored special function as primary source material for biographical scholars. *See Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C. Mass. 1841); *Estate of Hemingway v. Random House, Inc.*, 449 Misc.2d 726, 728, 268 N.Y.S.2d 531, 534 (Sup. Ct. 1966), *aff'd*, 25 App. Div. 2d 719, 269 N.Y.S.2d 366 (1966). Biographers and historians must undertake the duty of unearthing and effectively utilizing letters and private papers lodged in libraries—the contemporaneous, raw materials of their craft—unless they are merely to rewrite from published works, or subject themselves to the control of those they write about.

The Court of Appeals unjustifiably restricted the "latitude for scholarship and comment traditionally afforded by fair use," *Harper & Row v. Nation Enterprises*, 471 U.S. at 560, when it held that, apart from the bare "facts" recited in the letters and its erroneous restriction of fair use, any "[p]ublic awareness of the expressive content of the letters will have to await either [an author's] decision to publish or the expiration of his copyright. . . ." *Salinger v. Random House, Inc., supra*, 811 F.2d at 100. Section 109(c) of the Copyright Act already authorizes the very "public awareness of the expressive content of the letters" the Court of Appeals sought to deny. And section 107 permits critics, for example, to do more than mention the "facts" embodied in "unpublished" but publicly performed or disseminated works of drama or spoken poetry or works of nonfiction—they may reasonably quote, paraphrase, and comment on brief passages from literary works. There is no basis for affording authors any lesser latitude with regard to disseminated, publicly available research materials.[3]

Because the Second Circuit encompasses a great part of the publishing industry in the United States, its decision will have an immediate and far-ranging inhibiting effect. Authors and publishers will inevitably tend to engage in self-censorhip, steering clear of any paraphrase or quote from materials in

[3] Far from being hostile to the use of unpublished archives and library research collections, Congress provided a special exemption from the Act's copying restrictions to permit the provision of entire copies of such materials to other institutions for scholarly work. 17 U.S.C. § 108(b).

research libraries. The Court of Appeals' erroneous understanding of *Harper & Row* should be reviewed for this reason alone.

But that necessity for review is magnified by the prior restraint the Court of Appeals ordered, in the form of a preliminary injunction that has already lasted more than seven months. Prior restraints on publication have generally been held inimical to the Constitution except in extraordinary circumstances. *Near v. Minnesota*, 283 U.S. 697, 712-20 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971). This Court has not yet addressed the standards that should govern the question of prior restraints in copyright cases. This case provides an appropriate opportunity to do so.

The Court of Appeals' issuance of a prior restraint based upon its cramped construction of the fair use provision as it applies to research materials in libraries and archives turned the Copyright Act into the very engine for the suppression—not advancement—of information against which this Court warned in *Harper & Row, supra*. See 471 U.S. at 558-59. Absent this Court's review, the decision below will have a harmful impact well beyond Mr. Hamilton's biography of Mr. Salinger.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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